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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Petitioners,

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE,

Respondents.

MEMORANDUM IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Is a statute which permits any record in the possession of an agency to be withheld from disclosure, whenever the agency determines that disclosure is not required in the public interest, a statute which specifically exempts such records from disclosure within the meaning of 5 U.S.C. § 552(b)(3)?

STATEMENT OF THE CASE

The only question decided by the Court of Appeals for the District of Columbia Circuit, and the only one on which review is sought in this Court, is whether section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504 (1970), is a statute which "specifically" exempts records from disclosure, within the meaning of exemption 3 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3) (1970). Section 1104 purports to allow withholding "of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the [Civil Aeronautics] Board [the "CAB"] or the [Federal Aviation Administration (the "FAA") . . ." and thus, in effect, applies to any document in the possession of either agency. Upon the request of "any person," non-disclosure is permitted if it is determined in the "judgment" of the agency concerned that the "disclosure of such information would adversely affect the interests of [the person requesting non-disclosure] and [disclosure] is not required in the interest of the public." The Court of Appeals held that section 1104 was so open-ended a statute, both as to the documents covered by it and the absence of any standard beyond the "public interest" test for non-disclosure, that it was not a statute which "specifically" exempts records from disclosure within the purview of exemption 3. That decision is clearly correct, and there is no basis for this Court to review it.

This case originated in the summer of 1970 when respondents and others were engaged in a study of the FAA's administration of the laws relating to aviation safety. They requested access to various FAA documents, including the reports at issue here which are prepared under the

FAA's Systemsworthiness Analysis Program or "SWAP."[1] Under this program special teams of highly trained and experienced FAA inspectors make periodic examinations of the maintenance and safety operations of all U.S. certificated air carriers. These SWAP teams seek to identify significant failures and defects in the carriers' systems, procedures, recordkeeping, organization, training, and supervision, which may adversely affect compliance with applicable regulations and accepted standards of safety. The findings of the teams and their recommendations for corrective actions are then fully disclosed to the airline management in a special meeting held for that purpose, and a final SWAP report is prepared, containing those findings and recommendations.[2] It is these reports, which are the culmination of an effort by the FAA to improve air carrier safety by seeking to identify and cure problems before they result in accidents, which are sought in this proceeding.

Following petitioners' initial denial of respondents' request, an administrative appeal was filed in August 1970. While that appeal was pending, the Air Transport Association of America privately wrote the FAA on behalf of certain of the major airlines and requested that the SWAP reports be withheld from public disclosure pursuant to section 1104. On February 18, 1971, the FAA granted that

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[1] The SWAP program as in effect in November 1970 is described in FAA Systemsworthiness Analysis Program Handbook 8000.3B, which appears in the Joint Appendix in the Court of Appeals at pages 47-99 (hereinafter "JA").

[2] Their factual and analytical nature can be noted from the excerpts from an actual SWAP report submitted to the District Court (JA 39-41).

request and ordered that "all SWAP reports in existence or hereinafter to be made" shall be withheld from the public (JA 103).

Respondents had also unsuccessfully sought to obtain access to FAA documents known as Mechanical Reliability Reports (MRR's), which contain summaries of reports of serious mechanical malfunctions required to be submitted by the airlines to the FAA. These reports concern such problems as inflight fires and engine shutdowns, excessive cracks, corrosion, or structural damage, fuel leakage, and landing gear and other aircraft system malfunctions requiring emergency inflight action (JA 34-35). Although these reports are compiled by the FAA, printed at public expense, and mailed on a daily basis to a wide audience within the aviation industry, the FAA denied the request, initially because it lacked the consent of the Air Transport Association, and later because of its decision that the MRR's were exempt as "trade secrets and privileged or confidential information." In June 1971 this action was commenced, seeking both the SWAP reports and the MRR's. Thereafter, the FAA issued another *ex parte* determination at the request of the Air Transport Association, ruling that the MRR's, like the SWAP reports, were exempt from public disclosure on the authority of section 1104.

In defending this action in the District Court, petitioners claimed that both section 1104 and exemption 4 (trade secrets and confidential commercial or financial information) precluded disclosure of both the MRR's and the SWAP reports.[3] As to the SWAP reports, they also relied

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[3] 5 U.S.C. §552(b)(4) exempts ". . . trade secrets and commercial or financial information obtained from a person and privileged or confidential".

on exemptions 5 (intra-agency memoranda)[4] and 7 (investigatory files compiled for law enforcement purposes).[5] On cross motions for summary judgment, the District Court held that neither the MRR's nor the SWAP reports could be withheld, and that respondents were entitled to access to them on the same conditions as applied to persons in the airline industry (Pet. App. 19A-20A). Petitioners appealed only that part of the ruling relating to the SWAP reports.

In the Court of Appeals petitioners continued to press their claim that section 1104 was a statute which "specifically" exempts SWAP reports from disclosure under exemption 3, as well as their contention that exemptions 4, 5 and 7 entitled them to withhold the SWAP reports from respondents. The Court of Appeals, however, decided only the section 1104 issue, remanding the remainder of the case to permit the District Court to consider the effect of *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), an exemption 7 case, as well as "any other defense to disclosure [petitioners] may raise except Exemptions (1) and (3)" (Pet. App. 13A).

In ruling against petitioners on their claim that section 1104 is a statute which specifically exempts SWAP reports from disclosure, the Court of Appeals pointed to the absence of any clear definition or description of documents

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[4] 5 U.S.C. §552(b)(5) exempts ". . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[5] 5 U.S.C. §552(b)(7) exempts " . . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency".

to be covered by it, in contrast to the "definite class of documents" withheld in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973) (Pet. App. 4A). It further noted that the Freedom of Information Act was intended to replace the public interest standard under the prior existing law, with a broad rule of disclosure subject to nine specific exemptions (Pet. App. 8A-9A). It reasoned that to import via section 1104 a public interest test to be applied at the discretion of the FAA and the CAB would frustrate the goals of the Freedom of Information Act. Based upon these reasons, the Court of Appeals concluded that section 1104 was not a statute which "specifically exempted" the SWAP reports, and thus exemption 3 did not apply (Pet. App. 5A, 12A).

THE QUESTION PRESENTED IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The decision below is clearly correct, and the unstated premise of the petitioners – that Congress intended to allow the FAA and the CAB to use section 1104 to disregard the FOIA entirely – is untenable. Under the view advanced by petitioners, the FAA and the CAB, rather than Congress, could determine that any document in their possession could be withheld, unless disclosure was "required" in the public interest. This exemption from the FOIA for the aviation industry would be limited only to these two agencies, the FAA for safety and the CAB for economics, and would not apply to agencies regulating other modes of transportation such as automobiles, railroads, buses, and trucks. There is not the slightest reason advanced either in the petition, the legislative history of the FOIA, or elsewhere, to suggest any rationale for turning the FOIA's rule of disclosure on its head for the FAA and the CAB.

Exemption 3 of the Information Act excludes from disclosure "matters specifically exempted from disclosure by statute". The Court of Appeals found two basic defects in section 1104 which precluded it from coming within the ambit of exemption 3. First, the Court found that there was no adequate description of the class of documents covered, and second that section 1104 does not contain standards for the exercise of the judgment by the responsible agency official except for the generalized public interest test. As was noted in *Cutler v. Civil Aeronautics Board*, 375 F. Supp. 722, 724 (D.D.C. 1974), a case dealing with the authority of the CAB under section 1104, that statute would leave to the "virtually unbridled discretion" of the agency the decision as to whether to exempt a document, and hence it is not the statute but rather the agency, which controls disclosure, and this is contrary to the requirements of exemption 3.

In an attempt to rescue themselves from this situation, petitioners suggest that their actions would not be immune from judicial review but could be challenged in a Court of Appeals under 49 U.S.C. § 1486 (Pet. 16, n. 10). Quite apart from questions as to what the standard of review would be in such a proceeding, there is nothing to suggest why Congress would have wanted FOIA questions under section 1104 determined in a Court of Appeals, instead of in a District Court where the refusals of all other agencies to make disclosures are reviewed *de novo*. Furthermore, in cases such as this where there are other exemptions claimed, it would be necessary either to litigate those questions, which may include issues of fact,[6] in the Court of

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[6] Under the test established by the D.C. Circuit in determining whether information sought is "confidential" and either "commercial

(continued)

Appeals, or would require the bringing of two separate proceedings, one in the Court of Appeals with respect to section 1104, and another in the District Court for the remaining exemptions. Nothing in either the Federal Aviation Act or the Freedom of Information Act compels such a result, and there is no logical explanation to sustain it.

Contrary to the assertion of petitioners (Pet. 12-13), the decision below is not only consistent with the Court's ruling in *EPA v. Mink, supra,* but is fully supported by that decision. The class of documents covered in *Mink* – those "specifically required by Executive order to be kept secret in interest of the national security or foreign policy" – is entirely different from the open-ended provisions of section 1104 that apply to any application, report, document, or other information obtained by the FAA or the CAB. More importantly, this Court in *Mink* reviewed the legislative history of the predecessor to the Freedom of Information Act and pointed out that Congress had amended the law because the prior statute had been "plagued with vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest.'" *EPA v. Mink, supra,* 410 U.S. at 79. This Court then pointed out that the FOIA provisions "stand in sharp relief against those of §3 [the former law]" *id.*, and reasoned that the granting of nine specific exemptions was an attempt by Congress to strike a balance between the needs of secrecy and the desired goals of complete disclosure: "It is in the context of the Act's attempt to

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6 (continued) or financial," so that non-disclosure is warranted by exemption 4 (a defense also raised in *Cutler v. CAB, supra*), a factual record must be developed. See *National Parks and Conservation Ass'n v. Morton,* 498 F.2d 765, 770-771 (1974).

provide a 'workable formula' that 'balances, and protects all interests,' that the conflicting claims over the documents must be considered." *Id.* at 80.

As this Court noted in *Mink, id.* at 81-82, it was congressional criticism of the open-ended "public interest" exemption which was a strongly motivating factor leading to passage of the Freedom of Information Act. Yet it is that very kind of exemption that petitioners seek to reincorporate via section 1104. It is clear that in passing the FOIA Congress rejected the broad test of "public interest" as a basis for determining when there should be non-disclosure. Thus, it is almost inconceivable that Congress intended to allow the FAA and the CAB to continue using that standard under section 1104, particularly since there is no mention of such an intent in the legislative history, nor is there any suggested rationale for exempting these two agencies from the FOIA.

This case only presents a question as to the applicability of section 1104 to exemption 3 and, contrary to petitioners' assertion, does not present "an important and recurring question concerning the meaning of exemption 3 to the Freedom of Information Act" (Pet. 9). As petitioners concede, the restrictions contained in the statutes arguably within the ambit of exemption 3 are imposed in various ways, some providing for a mandatory and others providing for a discretionary non-disclosure. "They also vary with respect to the specificity of both the description of the material to be kept confidential and the basis upon which the government officials may disclose it" (Pet. 10). Given this range of statutes, the claimed applicability of exemption 3 should be considered on an individual basis, and therefore the only issue that would be resolved in this case is whether section 1104 comes within the third exemption.

As the petition points out, many of the other statutes have some but not all of the defects of section 1104, and the question of whether any single defect in a given statute is fatal to exemption 3 should be resolved in a case involving that statute, and not in this case which deals solely with section 1104.

Nor is there any "disagreement and uncertainty among the circuits" or any "confusion" regarding the effect of this decision on exemption 3, as alleged in the petition (page 17). For example, in *Stretch v. Weinberger*, 495 F.2d 639 (3rd Cir. 1974), a case cited by petitioners as a source of confusion, the analysis utilized was precisely the same as involved here. The Court stated that "the exempting statute must prescribe some basis upon which the Secretary is to decide. Otherwise there would be no escape from the unacceptable conclusion that the word 'specifically', as used in section 552(b)(3), is surplusage." *Id.* at 640. The Court went on to point out that both committees of Congress were concerned about the "recurring abuse of broad discretion," and that "the absence of standards to govern broad agency discretion was the chief evil at which Congress aimed." *Id.* at 641. That broad discretion is precisely the problem with section 1104, and nothing in *Stretch* is in any way inconsistent with the decision of the Court of Appeals below. We simply see no basis for the assertion of petitioners that the Third Circuit "is likely to hold that exemption 3 covers the documents involved in the present case. . ." (Pet. 17).

Nor are we able to understand the basis upon which the petitioners conclude that the Fourth Circuit "seemingly so indicated" in *Sears v. Gottschalk*, 502 F.2d 122 (1974), that the result in a section 1104 case in that Circuit would differ from that in the D.C. Circuit (Pet. 17).

The Court in *Sears* cited the Third Circuit's decision in *Stretch* with approval, noting both the emphasis in *Stretch* on the absence of statutory guidelines for the exercise of discretion and the necessity for a sufficient identification of the class of items Congress deemed appropriate for exemption (Pet. App. 29A-30A). The patent applications sought in *Sears* were specified in the relevant statute, 35 U.S.C. § 122, and thus were held to be exempt. Since that statute, which is very definite in its coverage, is so unlike the open-ended nature of section 1104, there is no basis to conclude that the *Sears* court would have reached a different result than did the lower courts here, if it had been considering section 1104.

Nor does the statement in *Sears*, based upon its reading of *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), that Congress had provided "some standards for the exercise of discretion" in section 1104 (Pet. App. 29A), alter this view. As the Fourth Circuit noted, the section 1104 exemption was only an alternative holding in *Evans*, and one which occupies barely half a page in the Federal Reporter. More importantly, that opinion never discussed the question of whether section 1104 was a statute covered by the third exemption but only ruled on whether the materials sought in *Evans* came within section 1104.[7] Finally, whatever the merits of the section 1104 claim are with

[7] Judged by the petition for certiorari in *Evans*, which dealt solely with whether the standards of section 1104 had been met (Petition in 71-698 at 15-16), and the opinion in the Fifth Circuit, it appears that Mr. Evans assumed that section 1104 was a statute covered by exemption 3 and that the arguments advanced here were never urged upon any court in that case.

regard to a single item of information submitted prior to the Freedom of Information Act, they simply have no bearing upon the intent by the Administrator here to shroud whole classes of past, present, and future SWAP reports with a veil of secrecy under the aegis of section 1104.

There is one further reason why review is inappropriate at this time. In addition to their claims of section 1104, petitioners have asserted that the fourth, fifth, and seventh exemptions to the FOIA also support their withholding of the SWAP reports.[8] The Court of Appeals did not rule upon these claims, but remanded to the District Court for further consideration in light of the decision in *Weisburg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (*en banc*). Thus, disclosure of these documents is nowhere near imminent, and there are three other defenses which may protect petitioners and render moot the claim that section 1104 is needed to protect vital interests of the FAA. Moreover, the fact that petitioners have claimed these other exemptions demonstrates that Congress could not have intended to superimpose section 1104 on top of all of the other exemptions that it had so carefully written into the law. All of the legitimate interests requiring secrecy have been amply protected by the nine specific exemptions enumerated in section 552(b), and there is no reason to conclude that Congress intended to establish in the FAA and CAB the right to administer mini-Freedom of Information Acts and to decide for themselves what is in the public interest and what should not be disclosed.

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[8] In the only other reported cases involving section 1104, *Evans v. DOT*, *supra*, and *Cutler v. CAB*, *supra*, the agency also claimed the applicability of exemptions 7 and 4, respectively.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN B. MORRISON
LARRY P. ELLSWORTH

Suite 700
2000 P Street, N.W.
Washington, D.C.
(202) 785-3704

Attorneys for the Respondents

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